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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-17-1010-STaL
)
 JAMES DONZIL ROBERTS, SR. and) Bk. No. 1:12-bk-16474-MT
 DEENA WALDMAN ROBERTS,)
) Adv. No. 1:12-ap-01371-MT
 Debtors.)
)
)
 JAMES DONZIL ROBERTS, SR.,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 MICHAEL BARNES; CALIFORNIA)
 FARMS INVESTORS LLC,)
)
 Appellees.)
)

Argued and Submitted on September 29, 2017
at Pasadena, California

Filed - November 13, 2017

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

Appearances: Peter T. Steinberg of Steinberg, Nutter & Brent
argued for appellant; Cathrynne Dale argued for
appellees

Before: SPRAKER, TAYLOR, and LAFFERTY, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 **INTRODUCTION**

2 Chapter 7¹ debtor James Donzil Roberts appeals from a
3 judgment excepting from discharge the debt arising from his
4 scheme to defraud Michael Barnes and California Farms Investors
5 LLC (collectively, "Barnes"). Roberts contends that the
6 bankruptcy court committed reversible error by not crediting the
7 value of the farm equipment collateral that secured repayment of
8 Barnes' loan against his damages. According to Roberts, there
9 was no loss caused by his fraud because the value of the
10 collateral was more than sufficient to offset the amount lent.

11 Roberts' disposition of collateral argument ignores the
12 bankruptcy court's determination that Barnes was forced to assign
13 his interest in the collateral to third party produce suppliers
14 in order to obtain a release of potentially massive liability
15 under the Perishable Agricultural Commodities Act - liability
16 that flowed from Roberts' fraud. Roberts' disposition of
17 collateral argument, furthermore, relies on California Commercial
18 Code statutes enacted to restrict the collection of contract-
19 based debts and attempts to apply them without any supporting
20 authority to a nondischargeable fraud claim.

21 Most importantly, Roberts admits that he failed to raise the
22 disposition of collateral argument at or before trial. Having
23 not raised this argument in response to the foreclosure of the
24 collateral or in the nondischargeability adversary proceeding,
25

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 Roberts forfeited this argument under clear and longstanding
2 doctrines of appellate process and as a matter of substantive
3 commercial law.

4 Accordingly, we AFFIRM.

5 **FACTS**

6 We primarily rely on the findings of fact set forth in the
7 bankruptcy court's Memorandum Decision. Roberts has not directly
8 challenged any of those findings, and the incomplete record
9 provided by the parties supports the findings made.

10 Roberts and two other individuals formed a joint venture
11 in 2009 for the stated purpose of producing and selling direct to
12 retail packages containing gourmet organic salads. Roberts and
13 his colleague Daniel Fantz were in charge of soliciting
14 financing. The third joint venturer - Santos Martinez - had
15 extensive farming experience as well as some 450 or so acres of
16 farmland that were to be used to grow at least some of the
17 lettuce varieties needed for the salads. Martinez also agreed to
18 contribute millions of dollars of farming equipment to the joint
19 venture.

20 The corporate structure of the joint venture was
21 straightforward. Roberts and Fantz formed California Farms, Inc.
22 ("California Farms") which became one of the two members of the
23 joint venture, California Farms II, LLC. The other member was
24 Manjar, Inc. - Martinez's wholly-owned farming business. The
25 joint venture was later renamed California Organics LLC
26 ("Organics").

27 In October 2009, a third party introduced Roberts and Fantz
28 to Barnes. Roberts and Fantz, through emails, phone calls and

1 in-person meetings made over the next several months, marketed
2 their Organics investment opportunity to Barnes. During the
3 course of that marketing, Roberts and Fantz presented a good deal
4 of information - much of it false or deceptive. As the
5 bankruptcy court later put it, this information included:

- 6 A. a business plan providing "projections" which
Defendant did not verify;
- 7 B. misleading "use of proceeds" projections;
- 8 C. false assurances regarding the status of accounts
receivable;
- 9 D. false assurances about guaranteed purchase contracts
which in fact did not exist.

10 Mem. Dec. (Sep. 9, 2015) at 3:13-16.

11 Overall, Roberts represented to Barnes that the joint
12 venture was an ongoing farming business already selling their
13 self-grown organic produce to wholesalers and that a short-term
14 bridge loan would enable the venture to shift their operations
15 into much more lucrative sales to retail grocers like Stater
16 Bros., Albertsons and others - some of whom already were
17 supposedly lined up to buy from the venture.

18 In reality, the venture was entirely dependent on Martinez'
19 and Manjar's farming expertise, acreage and certified organic
20 growers license to grow the produce they wanted to sell. At the
21 time Roberts began soliciting investment funds from Barnes,
22 however, Manjar had not started growing any produce. In fact,
23 neither Manjar nor the venture ever grew any produce for the
24 venture's business. Martinez and Manjar refused to grow any
25 produce for Organics unless Organics paid Manjar \$375,000, which
26 was never paid. Organics either was unable or unwilling to pay
27 that amount in order to grow its own produce.

28 This was a critical departure from the business model and

1 projections Roberts presented to Barnes in his solicitation
2 materials. The exceptional profits Roberts represented Organics
3 was poised to realize were dependent on self-grown produce sold
4 to retail grocers. Instead, Organics began purchasing produce
5 from third party growers and suppliers and then processed it and
6 resold it - mostly in the wholesale market. These operations
7 effectively enabled Organics to present itself to the investors
8 as a going concern, but they came at a steep cost: the incurrence
9 of massive debt. To make matters worse, unbeknownst to Barnes,
10 Organics' management - including Roberts, Fantz, Martinez and
11 others - paid themselves hundreds of thousands of dollars in
12 draws or "management fees."²

13 Between November 2009 and April 2010, Barnes loaned Organics
14 the aggregate amount of \$822,000.³ The loans were secured by
15 substantial personal property - mostly Manjar's farm equipment.
16 In addition, as one of a number of preconditions to investment,
17 Barnes was named in the venture's amended operating agreement as
18 a "class B manager." We do not specifically know all of Barnes'
19 rights and duties as a class B manager because the parties have
20 not included in their excerpts of record any of the exhibits
21 admitted at trial. But, the trial testimony indicated that
22 Barnes was entitled to routinely receive from the company
23 financial and operating reports and to approve or reject certain

24
25 ² On top of this, Roberts failed to disclose to Barnes that
26 Organics' executive manager - Geoffrey Mousseau - was a convicted
27 felon. Roberts, a licensed attorney, knew that Mousseau's
28 criminal record should have been disclosed to the investors.

³ Barnes also paid an additional \$3,000 as an equity
investment in California Organics.

1 transactions. In the event of a loan default Barnes could, and
2 eventually did, assume control of Organics' assets and operations
3 as manager of the joint venture.

4 The naming of Barnes as a manager, and his rights and duties
5 with respect to Organics' operations, is a key point because his
6 role in the venture potentially exposed him to personal liability
7 to Organics' produce suppliers under the Perishable Agricultural
8 Commodities Act - also known as PACA - 7 U.S.C. § 499a, et seq.
9 Pursuant to PACA, all commission merchants, dealers and brokers
10 of perishable agricultural goods hold those goods (and their
11 proceeds) in trust for the benefit of the vendor of such goods
12 unless and until the vendor is repaid. 7 U.S.C. § 499e(c)(2).
13 Those entities, and their control persons, are liable for any
14 dissipation of the trust's assets under ordinary trust
15 principles. Sunkist Growers v. Fisher, 104 F.3d 280, 282-283
16 (9th Cir. 1997); see also Nickey Gregory Co., LLC v. AgriCap,
17 LLC, 597 F.3d 591, 595 (4th Cir. 2010) ("[g]eneral trust
18 principles govern PACA trusts unless the principle conflicts with
19 PACA"); Weis-Buy Servs. v. Paglia, 411 F.3d 415, 421 (3d Cir.
20 2005) ("[i]ndividual liability in the PACA context is not derived
21 from the statutory language, but from common law breach of trust
22 principles"). The record below is devoid of any analysis of
23 either PACA or its application. What is clear, however, is that
24 the unpaid produce suppliers asserted substantial PACA claims
25 against Organics and Barnes individually.

26 At the time of his investment in Organics, Barnes had no way
27 of knowing of his potential PACA liability because he did not
28 know that Organics was purchasing produce from third party

1 suppliers. To the contrary, Roberts' offering materials and
2 projections created the false impression that all of Organics'
3 produce would be self grown. During the loan funding period,
4 Roberts affirmatively concealed from Barnes that Organics was
5 buying all of its produce from third party suppliers and that
6 Organics was incurring a large amount of PACA debt in the
7 process.

8 In or around June 2010, after discovering that Organics was
9 accumulating massive debt, Barnes exercised his right under
10 Organics' amended operating agreement to assume control over
11 Organics' operations and assets. We cannot say with any greater
12 precision when, or even whether, Barnes triggered the PACA
13 liability provisions for two reasons. First, the testimony
14 regarding Barnes' assumption of control did not provide a full
15 account of the timing and nature of Barnes' control. Second, the
16 appellate record provided by the parties is gravely incomplete:
17 the parties did not include copies of their trial exhibits for
18 review. Regardless, the unpaid produce suppliers asserted that
19 when Barnes assumed control over Organics he became liable for
20 the company's PACA debts.

21 Organics eventually failed and a number of PACA creditors
22 sued Organics and Barnes in September 2010. As with the issue of
23 Barnes' control over Organics, the specifics of the PACA lawsuit
24 are unknown. But, the trial record does disclose a handful of
25 critical facts. Namely, the litigation involved hundreds of
26 thousands of dollars in unpaid PACA debt. Additionally, as part
27 of that litigation, the produce suppliers asserted that the
28 equipment collateral securing the debt owed to Barnes was PACA

1 trust property or the proceeds of PACA trust property, and the
2 produce suppliers threatened injunctive relief against Barnes if
3 he attempted to foreclose on the collateral.

4 Faced with protracted litigation and potential exposure for
5 the alleged mishandling of PACA trust property, Barnes settled
6 with the PACA suppliers by assigning to them his security
7 interest in the equipment collateral.⁴ The precise nature of the
8 settlement and the assignment remains unclear given the record
9 provided. However, after the settlement was consummated, the
10 PACA suppliers commenced foreclosure proceedings in which they
11 claimed to be assignees of Barnes' rights under the notes and
12 security agreements that Organics and Manjar executed in favor of
13 Barnes.

14 The PACA suppliers subsequently foreclosed on the equipment.
15 The record on appeal does not disclose much about the foreclosure
16 either, other than it occurred in 2013. There are a few oblique
17 references to Exhibit 151, which was a copy of the PACA
18 creditors' foreclosure notice. As for the value of the
19 collateral at the time of foreclosure, there is nothing in the
20 record. The limited discussion at trial regarding collateral
21 value varied widely and was not attributed to the relevant time
22 frame of the foreclosure. Moreover, the statements regarding
23 value of the collateral were entirely based on hearsay - the
24 witnesses' recollections of other people's representations

27
28 ⁴ Again, the record is unclear whether Organics, Barnes, or
both, entered into the settlement or executed the assignment.

1 concerning the collateral's value.⁵

2 Roberts and his spouse filed a chapter 7 bankruptcy
3 petition, and Barnes thereafter filed an exception to discharge
4 complaint. While Barnes initially sought nondischargeability on
5 multiple grounds, the bankruptcy court after trial ruled in favor
6 of Barnes solely on his § 523(a)(2)(A) claim for relief.

7 According to the bankruptcy court, the solicitation
8 materials that Roberts presented to Barnes were "replete with
9 misrepresentations," which created the false impression that
10 California Farms (one of Organics' two members) was a going
11 concern when in reality that entity was nothing more than
12 Roberts' and Fantz' prospective plan to sell gourmet organic
13 salads. As the bankruptcy court further explained, Roberts'
14 offering materials concealed that no one at California Farms had
15 any material or relevant farming experience and that it had no
16 operational history with Martinez or Manjar.

17 The bankruptcy court also pointed to Roberts'
18 misrepresentations regarding California Farms' ability to grow -
19 and experience growing - its own produce. Roberts stated in his
20 offering brochure that "California Farms . . . was a 'Direct Farm
21 - to Volume Retail Sales Model,'" and that it would use "'farming
22 operations and processing equipment' and 'existing growing
23 fields.'" As the bankruptcy court put it:

24
25 ⁵ For instance, Barnes testified at trial that Roberts
26 represented to him, at the time of Barnes' investment, that the
27 collateral was worth more than three million dollars. Roberts
28 later seized on this testimony and attempted to argue that it
constituted proof of the value of the collateral and proof that
Barnes gave the PACA creditors more than \$3 million in
collateral.

1 With reckless disregard, Roberts boasted how Organics
2 LLC could triple revenues, with negligible increase in
3 costs, through redirecting delivery of self-grown
4 lettuce from wholesalers to retailers. Roberts
5 claimed, "we have now successfully established the
6 mechanism to grow, harvest, process, sell and deliver
7 to major market retailers at levels that we believe
8 will be in excess of our own conservative projections."

9 Mem. Dec. (Sept. 9, 2015) at 10:2-5.

10 The bankruptcy court also specified that Roberts' deception
11 continued during the entire investment period, from November 2009
12 through April 2010. During this period, the bankruptcy court
13 noted, Roberts concealed that Organics was not growing any
14 produce, was still primarily selling to wholesalers in three-
15 pound packages and was relying on third party produce vendors who
16 were PACA trust beneficiaries to supply Organics with all produce
17 necessary to maintain operations.⁶

18 Based on these and other findings, the bankruptcy court
19 concluded that Roberts' scheme to defraud Barnes had resulted in
20 the complete loss of his \$825,000 investment: "Plaintiffs' loss
21 of its \$825,000 investment in the Venture was actually and
22 proximately caused by Roberts' misrepresentations. . . . But for

23 ⁶ The following paragraph is representative of the
24 bankruptcy court's findings:

25 Roberts also withheld disclosing the PACA orders
26 because he knew that if he sought permission from
27 Plaintiffs to undertake the purchasing from third party
28 growers that Plaintiffs would have learned the true
state of affairs of the Venture and would have
exercised their remedies, which would have frustrated
and prevented the additional funding the Venture was
seeking.

Mem. Dec. (Sept. 9, 2015) at 12:1-11.

1 Roberts' misrepresentations, Plaintiffs would not have invested
2 in the Venture and subsequently lost their investment when the
3 Venture could [no] longer pay the PACA creditors it was
4 purchasing from." Mem. Dec. (Sept. 9, 2015) at 14:4-11.

5 The bankruptcy court entered judgment in favor of Barnes on
6 December 8, 2016. Roberts timely appealed.

7 JURISDICTION

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b) (2) (I), and we have jurisdiction under
10 28 U.S.C. § 158.

11 ISSUE

12 Did the bankruptcy court err by not crediting the value of
13 the equipment collateral against the \$825,000 Barnes invested?

14 STANDARDS OF REVIEW

15 In nondischargeability appeals, we review the bankruptcy
16 court's findings of fact under the clearly erroneous standard and
17 its conclusions of law de novo. Oney v. Weinberg
18 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009), aff'd,
19 407 Fed. Appx. 176 (2010).

20 DISCUSSION

21 Section 523(a) (2) (A) excepts from discharge debts for money,
22 property or services "obtained by false pretenses, a false
23 representation, or actual fraud" There are five
24 elements bankruptcy courts typically look for in order to
25 conclude that debtor's liability arose from a fraudulent,
26 nondischargeable act. Those elements are:

27 (1) misrepresentation, fraudulent omission or deceptive
28 conduct by the debtor; (2) knowledge of the falsity or
deceptiveness of his statement or conduct; (3) an

1 intent to deceive; (4) justifiable reliance by the
2 creditor on the debtor's statement or conduct; and
3 (5) damage to the creditor proximately caused by its
4 reliance on the debtor's statement or conduct.

5 Id. at 35 (quoting Turtle Rock Meadows Homeowners Ass'n v. Slyman
6 (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)).

7 In his appeal brief, Roberts does not challenge the
8 bankruptcy court's determination that he defrauded Barnes or that
9 Barnes lost \$825,000 as a result of his fraud. Rather, he
10 maintains that the bankruptcy court did not credit him for the
11 value of the equipment collateral in calculating Barnes' fraud
12 damages. According to Roberts, there was evidence in the record
13 demonstrating that the collateral was worth millions of dollars.
14 Roberts, therefore, posits that once the value of the collateral
15 is taken into account Barnes really did not suffer any loss. He
16 argues that the bankruptcy court's failure to credit the value of
17 the collateral against the amount of Barnes' damages constitutes
18 reversible error.

19 Barnes points out Roberts did not raise this argument in the
20 bankruptcy court and contends that he may not raise this argument
21 for the first time on appeal. Roberts concedes that he did not
22 raise the disposition of collateral issue at trial.⁷ Rather, he
23 argues that this Panel has the equitable discretion to consider
24 this argument for the first time on appeal.

25 Before we address the propriety of potentially considering
26 Roberts' application of the collateral argument for the first

27 ⁷ Roberts never raised the value of the collateral or its
28 disposition, nor any legal argument related to these facts, in
his answer, statement of pretrial issues, or closing brief.

1 time on appeal, it is important to note the substantive legal
2 context in which this argument is made. Roberts attempts to
3 invoke commercial law principles governing the recovery of a
4 deficiency judgment for contract-based debts in the context of a
5 nondischargeable fraud claim. He does so without citing any
6 authority that would enable him to insert the square peg of the
7 California Commercial Code into the round hole of
8 nondischargeability litigation for fraud.

9 Equally important, although Roberts never raised the
10 collateral issue at trial, there was enough evidence generally
11 concerning the collateral that the bankruptcy court did, in fact,
12 take into account both the PACA liability and the foreclosure of
13 the collateral in assessing the consequences of Roberts' fraud.
14 As the bankruptcy court found: "Without Plaintiffs' knowledge or
15 consent, Barnes was exposed to personal liability for [Organics'
16 PACA] debts. . . . Ultimately, Barnes was forced to assign the
17 collateral securing repayment of [his] investment to the PACA
18 creditors in order to settle his liability under the PACA
19 lawsuits." Mem. Dec. (Sept. 9, 2015) at 4:10-13. In other
20 words, Barnes "lost" the collateral when it was used to satisfy
21 the PACA related damages that also flowed from Roberts' fraud.
22 Roberts simply ignores this finding and its consequences in
23 making his collateral argument.

24 We decline to dwell on the above-referenced deficiencies in
25 Roberts' argument. There is a simpler response to his argument:
26 neither sound doctrines of appellate process nor substantive
27 commercial law permit us to consider Roberts' application of the
28 collateral argument for the first time on appeal. We explain why

1 below.

2 We start with the unremarkable proposition that issues not
3 raised before appeal ordinarily are forfeited on appeal. Scovis
4 v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001).
5 Absent exceptional circumstances, the appellate court can refuse
6 to consider them. Id.; El Paso City of Tex. v. Am. W. Airlines,
7 Inc. (In re Am. W. Airlines), 217 F.3d 1161, 1165 (9th Cir.
8 2000).

9 The Ninth Circuit Court of Appeals has recognized the
10 following as exceptional circumstances that may permit the
11 appellate court to consider an issue for the first time on
12 appeal:

13 (1) when review is required to "prevent a miscarriage
14 of justice or to preserve the integrity of the judicial
15 process," (2) "when a new issue arises while appeal is
16 pending because of a change in the law," and (3) "when
the issue presented is purely one of law and either
does not depend on the factual record developed below,
or the pertinent record has been fully developed."

17 Mano-Y & M, Ltd. v. Field (In re Mortg. Store, Inc.), 773 F.3d
18 990, 998 (9th Cir. 2014) (quoting In re Mercury Interactive Corp.
19 Sec. Litig., 618 F.3d 988, 992 (9th Cir. 2010)).

20 Roberts has not presented anything on appeal that suggests
21 his failure to raise the collateral issue at trial has resulted
22 in a miscarriage of justice. Nor has he established that the
23 disposition of collateral issue arose from a change in the law.
24 Finally and most importantly, the disposition of collateral issue
25 is decidedly not an issue of law but is closely tied to the
26
27
28

1 facts.⁸ The record was never developed to address this factual
2 issue because Roberts failed to raise it.

3 Even if well settled principles of appellate procedure did
4 not prevent Roberts from raising the disposition of collateral
5 argument for the first time on appeal, the substantive commercial
6 law he relies upon does. The sole legal basis now advanced by
7 Roberts in support of his disposition of collateral argument is
8 premised on California Commercial Code section 9626. Generally
9 speaking, this provision governs a creditor's right to a
10 deficiency judgment and incorporates the requirement that secured
11 creditors dispose of their collateral in a commercially
12 reasonable manner. California Commercial Code section 9610(b)
13 requires secured creditors to dispose of collateral in a
14 commercially reasonable manner.⁹ In turn, California Commercial
15 Code section 9626(a)(3) provides:

16 (3) Except as otherwise provided in Section 9628, if a
17 secured party fails to prove that the collection,
18 enforcement, disposition, or acceptance was conducted
19 in accordance with the provisions of this chapter
20 relating to collection, enforcement, disposition, or
21 acceptance, the liability of a debtor or a secondary
obligor for a deficiency is limited to an amount by
which the sum of the secured obligation, expenses, and
attorney's fees exceeds the greater of either of the
following:

22 ⁸ The factual nature of Roberts' sole argument on appeal is
23 further discussed below.

24 ⁹ That commercial code provision states:

25 (b) Every aspect of a disposition of collateral,
26 including the method, manner, time, place, and other
27 terms, must be commercially reasonable. If
28 commercially reasonable, a secured party may dispose of
collateral by public or private proceedings, by one or
more contracts, as a unit or in parcels, and at any
time and place and on any terms.

1 (A) The proceeds of the collection, enforcement,
2 disposition, or acceptance.

3 (B) The amount of proceeds that would have been
4 realized had the noncomplying secured party proceeded
5 in accordance with the provisions of this chapter
relating to collection, enforcement, disposition, or
acceptance.

6 Roberts now seeks to reduce his liability to Barnes by
7 citing California Commercial Code section 9626(a) (3) and by
8 alleging that he failed to dispose of the collateral in a
9 commercially reasonable manner.

10 Roberts bases his argument upon the California Commercial
11 Code. However, Barnes has recovered damages for fraud, not a
12 deficiency judgment for breach of a secured contractual
13 obligation. Even if the court were to apply the commercial
14 reasonableness requirement set forth in California Commercial
15 Code section 9626(a) (3), additional issues abound. Roberts'
16 argument implicitly assumes that: (1) the assignment of the
17 collateral to the PACA creditors constituted a disposition of
18 collateral, (2) such disposition was not commercially reasonable,
19 and (3) the judgment entered by the bankruptcy court constituted
20 a "deficiency judgment" under California's Commercial Code.
21 Roberts fails to address these matters in any detail, saying only
22 that the bankruptcy court failed to credit the value of the
23 collateral against his liability.

24 It is far from clear whether the Commercial Code would treat
25 the subject assignment as a disposition of collateral (or treat
26 the nondischargeability judgment as a deficiency judgment). The
27 Commercial Code indicates that some - but not all - assignments
28 qualify as dispositions of collateral. See generally Cal. Com.

1 Code §§ 9406(e), 9618(b)(1). Case law confirms that not all
2 assignments of security interests constitute dispositions of
3 collateral that could result in a deficiency or surplus. See,
4 e.g., Lee & Mason Int'l Agency, Inc. v Daugherty, 828 S.W.2d 677,
5 679 (Ky. App. 1992); Reeves v. Assocs. Fin. Servs. Co.,
6 247 N.W.2d 434, 439 (Neb. 1976); but see also Charles E. Brauer
7 Co. v. NationsBank of Virginia, N.A., 251 Va. 28, 34 (Va. 1996)
8 (“[t]he term ‘disposition’ is not defined in the U.C.C., but the
9 language of [the predecessor to section 9610(a) and (b)]
10 indicates that it means an actual transfer of an interest in the
11 collateral by sale, lease, or contract”).

12 We need not decide whether the assignment at issue herein
13 qualified as a disposition of collateral. Even if the assignment
14 were a disposition resulting in a deficiency, Roberts is
15 precluded by substantive commercial law from arguing for the
16 first time on appeal that the assignment was commercially
17 unreasonable. Section 9626(a) of the California Commercial Code
18 provides:

19 (a) In an action arising from a transaction, other than
20 a consumer transaction, in which the amount of a
21 deficiency or surplus is in issue, the following rules
22 apply:

23 **(1) A secured party need not prove compliance**
24 **with the provisions of this chapter relating**
25 **to collection, enforcement, disposition, or**
26 **acceptance unless the debtor or a secondary**
27 **obligor places the secured party's compliance**
28 **in issue.**

(2) If the secured party's compliance is
placed in issue, the secured party has the
burden of establishing that the collection,
enforcement, disposition, or acceptance was
conducted in accordance with this chapter.

(Emphasis added.)

1 As the Assembly Committee Comment accompanying the statute
2 explains, a debtor seeking to block a deficiency judgment must
3 raise the issue of noncompliance with the Commercial Code (i.e.,
4 the failure to act in a commercially reasonable manner) "in
5 accordance with the forum's rules of pleading and practice." Id.
6 If the debtor fails to do so, then "the secured party need not
7 prove compliance with the relevant provisions" of the Commercial
8 Code. Id. In short, Barnes was under no duty to prove that his
9 conduct was commercially reasonable - and the bankruptcy court
10 was not obliged to make any sort of commercial reasonableness
11 finding - when Roberts never raised the issue.

12 Requiring the obligor to raise the disposition of collateral
13 issue makes eminent sense. Commercial reasonableness is an
14 inherently factual issue whose resolution typically depends on
15 all of the particularized circumstances of each individual case.
16 Ford & Vlahos v. ITT Commercial Fin. Corp., 8 Cal. 4th 1220, 1235
17 (1994); Crosby v. Reed (In re Crosby), 176 B.R. 189, 195 (9th
18 Cir. BAP 1994), aff'd, 85 F.3d 634 (9th Cir. 1996); see also
19 In re El Camino Charter Lines, Inc., 2012 WL 1514815, *2 (Bankr.
20 N.D. Cal. Apr. 27, 2012). When, as here, the debtor did not
21 properly raise the commercial reasonableness issue before trial,
22 the secured creditor is denied an opportunity to adequately
23 prepare and present evidence on the issue. A trial court
24 attempting to address the issue that has not been properly raised
25 or developed would be left to speculate whether all of the
26 relevant circumstances concerning reasonableness have been
27 disclosed.

28 This Panel cannot consider Roberts' disposition of

1 collateral argument for the first time on appeal. The governing
2 commercial statute relied upon by Roberts, as well as sound
3 appellate practice, dictate this result. Given that Roberts has
4 not raised any other issues on appeal, we AFFIRM.

5 **CONCLUSION**

6 For the reasons set forth above, we AFFIRM the bankruptcy
7 court's nondischargeability judgment.